No. 09-263

In the Supreme Court of the United States

SANDRA FERGUSON, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

In 1996, Congress repealed Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), which provided for a discretionary waiver of deportation, and replaced it with another form of discretionary relief not available to aliens convicted of certain crimes, including aggravated felonies and controlled-substance offenses. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held that the repeal of Section 212(c) did not apply retroactively to an alien previously convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for discretionary relief. The questions presented are:

1. Whether this Court's holding in *St. Cyr* applies to an alien who was convicted of a controlled-substance offense after trial, and who therefore did not relinquish her right to a trial in reliance on potential eligibility for a waiver under Section 212(c).

2. Whether detrimental reliance is necessary to establish the retroactive effect that this Court has construed the repeal of the availability of relief under former Section 212(c) to avoid, and, if so, whether actual or objectively reasonable reliance is required.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 563 F.3d 1254. The orders of the Board of Immigration Appeals (Pet. App. 30a-32a, 35a-38a) and the immigration judge (Pet. App. 33a-34a, 39a-40a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 2009. On June 23, 2009, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 29, 2009. On July 16, 2009, Justice Thomas further extended the time to August 28, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized some permanent resident aliens domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion. While, by its terms, Section 212(c) applied only to exclusion proceedings, it was generally construed as being applicable in both deportation and exclusion proceedings. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

Between 1990 and 1996, Congress enacted three statutes that "reduced the size of the class of aliens eligible for" relief under Section 212(c). *St. Cyr*, 533 U.S. at 297. In the Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 5052, Congress made Section 212(c) unavailable to anyone who had been convicted of an aggravated felony and served a term of imprisonment of at least five years. In 1996, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, Congress further amended Section 212(c) to make ineligible for discretionary relief aliens previously convicted of certain criminal offenses, including controlled-substance offenses. See *St. Cyr*, 533 U.S. at 297 n.7. Later that year, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, Congress repealed Section 212(c) in its entirety, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b. The latter section now provides for a form of discretionary relief known as cancellation of removal that is not available to many criminal aliens, including those who have been convicted of an aggravated felony (which, as relevant here, includes a

drug-trafficking crime). See 8 U.S.C. 1101(a)(43)(B), 1229b(a)(3); see also *St. Cyr*, 533 U.S. at 297.

In *St. Cyr*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for relief under Section 212(c). 533 U.S. at 314-326. In particular, the Court explained that, before 1996, aliens who decided "to forgo their right to a trial" by pleading guilty to an aggravated felony "almost certainly relied" on the chance that, notwithstanding their convictions, they would still have some "likelihood of receiving § 212(c) relief" from deportation. *Id.* at 325.

On September 28, 2004, after notice-and-comment rulemaking proceedings, the Department of Justice promulgated regulations to take account of the decision in *St. Cyr*. See *Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57,826 (2004). In its response to comments received on its proposed rule, the Department noted cases holding that "an alien who is convicted after trial is not eligible for [S]ection 212(c) relief under *St. Cyr*," and then stated that it "has determined to retain the distinction between ineligible aliens who were convicted after criminal trials[] and those convicted through plea agreements." *Id.* at 57,828. That determination is reflected in the regulations, which make aliens ineligible to apply for relief under former Section 212(c) "with respect to convictions entered after trial." 8 C.F.R. 1212.3(h).

2. Petitioner is a native of Jamaica who was admitted to the United States for lawful permanent residence in 1977. Pet. App. 39a; Administrative Record 513 (A.R.). On July 7, 1986, after a trial at which petitioner

pleaded not guilty, the Circuit Court for Cook County, Illinois, found petitioner guilty of the offense of possession with intent to deliver more than thirty grams of a substance containing cocaine, in violation of Illinois law. Pet. App. 39a; A.R. 482-484. On September 9, 1986, petitioner was sentenced to a six-year term of imprisonment, of which she served less than three years. A.R. 67, 484.

On May 19, 1998, the former Immigration and Naturalization Service (INS) commenced removal proceedings against petitioner. A.R. 515-518. A few weeks later, INS filed a superseding Notice to Appear, charging petitioner with being removable for having been convicted of an offense relating to a controlled substance and an aggravated felony drug-trafficking crime. A.R. 513-514; see 8 U.S.C. 1227(a)(2)(B)(i), 1227(a)(2)(A)(iii). On May 18, 1999, an immigration judge found petitioner to be removable under 8 U.S.C. 1227(a)(2)(B)(i), on the basis of her conviction for an offense relating to a controlled substance, and also found her to be ineligible for cancellation of removal or other relief. Pet. App. 40a.

On June 11, 2002, after this Court's decision in *St. Cyr*, the Board of Immigration Appeals (BIA) remanded the case to the immigration judge to determine whether petitioner is eligible for a waiver of removal under former Section 212(c). Pet. App. 37a-38a. On June 1, 2006, after a hearing, the immigration judge pretermitted petitioner's application for a waiver because, unlike the alien in *St. Cyr*, petitioner had gone to trial on her drug offense rather than pleading guilty. *Id.* at 34a. On August 4, 2006, the BIA affirmed the immigration judge's decision and dismissed petitioner's appeal. *Id.* at 30a-32a.

3. The court of appeals denied petitioner's petition for review of the BIA's decision in a published opinion dated March 31, 2009. Pet. App. 1a-29a. After describing what it characterized as a split among the circuits on how to apply *St. Cyr* to aliens who did not plead guilty, *Id.* at 15a-22a, the court held, as a matter of first impression in the circuit, that reliance is relevant to and should be the focus of retroactivity analysis as laid out in *St. Cyr*, even if it is not the only basis for determining whether a statute is impermissibly retroactive. *Id.* at 26a-28a. The court declined to extend *St. Cyr*'s holding, and because petitioner did not plead guilty, was convicted after a trial, and did not identify any other past transactions or considerations for which she had relied on the potential for relief under Section 212(c), the court found that relief under former Section 212(c) is not available. *Id.* at 29a.

ARGUMENT

Petitioner contends (Pet. 22-24) that *INS* v. *St. Cyr*, 533 U.S. 289 (2001), which involved an alien convicted of an aggravated felony after a plea agreement, has been misinterpreted by the majority of the courts of appeals and that the availability of relief under former Section 212(c) of the INA should be extended to any alien found guilty of a deportable offense after a jury trial, because retroactivity analysis should not include any consideration of likely reliance. In the alternative, petitioner contends (Pet. 24-25) that, if reliance is relevant, there need not be a showing of "actual, subjective reliance" because a decision "to go to trial rather than accept [a] plea bargain[]" could have been made "in reasonable reliance on the continuing availability of Section 212(c) relief."

The decision of the court of appeals does not warrant further review because petitioner's arguments lack merit. The courts of appeals have correctly recognized that reliance is a significant factor to be considered for purposes of retroactivity analysis, although it may be given different weight in different circuits and there is some variation about whether the requisite reliance must be actual (as opposed to objectively reasonable) reliance. Furthermore, the underlying question involves the retroactive effect of a statutory repeal that occurred more than 13 years ago, and this Court has denied petitions urging a similar extension of *St. Cyr* in a number of prior cases. See, *e.g.*, *Cruz-Garcia* v. *Holder*, 129 S. Ct. 2424 (2009); *Aguilar* v. *Mukasey*, 128 S. Ct. 2961 (2008); *Zamora* v. *Mukasey*, 128 S. Ct. 2051 (2008); *Hernandez-Castillo* v. *Gonzales*, 549 U.S. 810 (2006); *Thom* v. *Gonzales*, 546 U.S. 828 (2005); *Stephens* v. *Ashcroft*, 543 U.S. 1124 (2005); *Reyes* v. *McElroy*, 543 U.S. 1057 (2005); *Lawrence* v. *Ashcroft*, 540 U.S. 910 (2003); *Armendariz-Montoya* v. *Sonchik*, 539 U.S. 902 (2003).

1. Petitioner argues (Pet. 22-27) that the decision below conflicts with this Court's retroactivity analysis, and that the court of appeals should not have taken any reliance interest into account in deciding whether the repeal of Section 212(c) applies to aliens in her position. That objection lacks merit. As this Court has explained, in determining whether a statute has a retroactive effect, a court must make a "commonsense, functional judgment" that "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Martin* v. *Hadix*, 527 U.S. 343, 357-358 (1999) (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994)).

In *St. Cyr* itself, this Court placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*," whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits." 533 U.S. at 321-322 (citation and internal quotation marks omitted). In light of "the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA," the Court concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And because the Court concluded that aliens in St. Cyr's position "almost certainly relied upon th[e] likelihood [of receiving § 212(c) relief] in deciding whether to forgo their right to a trial," the Court held that "the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325. As the court of appeals below explained, petitioner's contrary view "would render the Supreme Court's reasoning and analytical approach—explained in *St. Cyr*—superfluous by half." Pet. App. 27a.

In asserting that the court of appeals misinterpreted *St. Cyr*, petitioner relies principally (Pet. 22-25) on two of this Court's retroactivity cases: *Landgraf* and *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997). But petitioner also argues (Pet. 25-27) that the court of appeals' reasoning conflicts with the canon of statutory interpretation, described in *Clark* v. *Martinez*, 543 U.S. 371 (2005), that a single statutory term cannot be construed to have different meanings based on the factual circumstances of the applicant.

Those cases do not support petitioner's arguments. In *Landgraf*, the Court specifically identified "reasonable reliance" as a consideration that "offer[s] sound guidance" in evaluating retroactivity, 511 U.S. at 270, and it quoted that same proposition from *Landgraf* in *St. Cyr*, 533 U.S. at 321, which was decided well after *Hughes Aircraft*. The canon of statutory interpretation in *Clark* is inapplicable to the relevant aspect of this Court's retroactivity analysis. *Clark* interpreted a statutory term. See 543 U.S. at 378. The second step of retroactivity analysis, on the other hand, determines the temporal reach of a statute only when it has been established that the statute contains no provision establishing its retroactivity. See *St. Cyr*, 533 U.S. at 316-317. Where the application of a statute would have retroactive effect, retroactivity analysis may require a court to decline to apply the statute. *Id.* at 316. Conversely, in a case where the same statute would not have retroactive effect, there is no reason not to apply the statute. See *Landgraf*, 511 U.S. at 269-270. Whether a statute's application would have a retroactive effect necessarily depends on "transactions" and "considerations already past" that are associated with a particular case. *Ibid.* (quotation marks omitted). Nothing in *St. Cyr* suggested that any alien who was eligible for Section 212(c) relief before its repeal would remain forever eligible. To the contrary, the Court held that Section "212(c) relief remains available for aliens, *like respondent, whose convictions were obtained through plea agreements* and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." 533 U.S. at 326 (emphasis added).

Moreover, the Supreme Court cases petitioner cites predated this Court's most recent decision addressing retroactivity in the immigration context. In *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006), the Court explicitly discussed *St. Cyr* and reconfirmed the importance of reliance. In *Fernandez-Vargas*, the Court stated that *St. Cyr* "emphasized that plea agreements involve a *quid pro quo* * * * in which a waiver of constitutional rights * * * had been exchanged for a perceived benefit * * * valued in light of the possible discretionary relief, a focus of expectation and reliance." *Id.* at 43-44 (citations and internal quotation marks omitted). Distinguishing the situation of the alien in *Fernandez-Vargas* from that of the alien in *St. Cyr*, the Court remarked that, "before IIRIRA's effective date Fernandez-Vargas never availed himself of [provisions providing for discretionary relief] or took action that enhanced their significance to him in particular, as St. Cyr did in making his *quid pro quo* agreement." *Id.* at 44 n.10.

Thus, the court of appeals did not err in considering the prospect of reasonable reliance as part of its "commonsense, functional" judgment about retroactivity. *Martin*, 527 U.S. at 357.

2. Petitioner contends (Pet. 7-20) that this case offers a suitable vehicle to resolve a conflict among the circuits as to the continued availability of relief under former Section 212(c) to aliens who were convicted of crimes before the enactment of AEDPA and IIRIRA. First, this case is a poor vehicle because the court below explicitly "express[ed] no opinion on whether aliens may prove an impermissible retroactive effect by demonstrating reliance on other 'transactions' or 'considerations already past' that do not involve a criminal conviction or the decision to go to trial." Pet. App. 29a n.28.

Second, the disagreement in the analysis of the circuits is narrow. Nine circuits have declined to extend the holding of *St. Cyr* as a general matter to aliens who were convicted after going to trial rather than pleading guilty. See *Dias* v. *INS*, 311 F.3d 456, 458 (1st Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Rankine* v. *Reno*, 319 F.3d 93, 102 (2d Cir.), cert. denied, 540 U.S. 910 (2003); *Mbea* v. *Gonzales*, 482 F.3d 276, 281-282 (4th Cir. 2007); *Hernandez-Castillo* v. *Moore*, 436 F.3d 516, 520 (5th Cir.), cert. denied, 549 U.S. 810 (2006); *Kellermann* v. *Holder*, No. 08-3927, 2010 WL 252264, at *5-*7 (6th Cir. Jan. 25, 2010); *United States* v. *De Horta Garcia*, 519 F.3d 658, 661 (7th Cir.), cert. denied, 129 S. Ct. 489 (2008); *Hernandez de Anderson* v. *Gonzales*, 497 F.3d 927, 940 (9th Cir. 2007); *Hem* v. *Maurer*, 458 F.3d 1185, 1189 (10th Cir. 2006); Pet. App. 1a-29a (11th Cir. 2009). Two circuits have held that no showing of reliance is required and that new legal consequences attached by IIRIRA to an alien's conviction were sufficient to prevent the BIA from precluding Section 212(c) relief. See *Atkinson* v. *Attorney Gen.*, 479 F.3d 222, 231 (3d Cir. 2007); *Lovan* v. *Holder*, 574 F.3d 990, 994 (8th Cir. 2009) (following *Atkinson* with little further analysis).[1]

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[1] Petitioner cites (Pet. 9) the Fourth Circuit's decision in *Olatunji* v. *Ashcroft*, 387 F.3d 383 (2004), as rejecting a reliance requirement for retroactivity analysis. The retroactivity issue in *Olatunji*, however, involved the loss of an alien's ability to take brief trips abroad without subjecting himself to removal proceedings, *id.* at 395-396, rather than the loss of access to Section 212(c) relief. *Olatunji* itself distinguished the Fourth Circuit's prior decision in *Chambers* v. *Reno*, 307 F.3d 284 (2002), which involved Section 212(c). See *Olatunji*, 387 F.3d at 392 (discussing *Chambers*, 307 F.3d at 293). As petitioner acknowledges (Pet. 9 n.4), even after *Olatunji*, the Fourth Circuit has—directly contrary to petitioner's argument on the merits—continued to hold that

In *Atkinson*, the Third Circuit retreated from dictum in *Ponnapula* v. *Ashcroft*, 373 F.3d 480 (2004), which had suggested that an alien who had not been offered a guilty plea would be unable to establish reliance for purposes of retroactivity analysis, *id.* at 494. The Third Circuit in *Atkinson* held that the repeal of Section 212(c) should not be construed to apply retroactively to "aliens who, like Atkinson, had not been offered pleas and who had been convicted of aggravated felonies following a jury trial at a time when that conviction would not have rendered them ineligible for [S]ection 212(c) relief."[2] 479 F.3d at 229-230.

The *Atkinson* court's analysis was based on the observation that this Court "has never held that reliance on the prior law is an element required to make the determination that a statute may be applied retroactively." 479 F.3d at 227-228. But that result cannot be squared with the rationale of *St. Cyr*, which specifically identified "reasonable reliance" as an important part of the "commonsense, functional judgment" in retroactivity analysis, and then explicitly rested its holding on the assessment that it was likely that aliens who pleaded guilty prior to 1996 had reasonably relied on the possible availability of Section 212(c) relief. See 533 U.S. at 321-323. If the Third Circuit's view that retroactivity analysis turns on the fact of conviction simpliciter were correct, then that entire discussion in *St. Cyr* was superfluous.

"IIRIRA's repeal of § 212(c) did not produce an impermissibly retroactive effect as applied to an alien convicted after trial." *Mbea*, 482 F.3d at 281.

[2] The present record does not indicate whether petitioner was offered a plea agreement, and as the court of appeals noted, "aside from her decision to go to trial, [petitioner] points to no other 'transactions' or 'considerations already past' on which she relied." Pet. App. 29a.

Furthermore, the Court's analysis in *St. Cyr* was focused on the prospect of detrimental reliance by an alien who pleaded guilty between 1990, when Congress enacted the bar to Section 212(c) relief for aliens who served more than five years on a sentence for an aggravated felony, and 1996, when Congress repealed Section 212(c) altogether. See *St. Cyr*, 533 U.S. at 293 (describing the facts of St. Cyr's case); *id.* at 297 (describing 1990 enactment); *id.* at 323 (describing circumstances of an alien whose "sole purpose" in plea negotiations was to "ensure" a sentence of less than five years). During that six-year period, an alien concerned about preserving eligibility for relief under Section 212(c) would have had an incentive to enter into a plea agreement that provided for a sentence of five years or less, rather than go to trial and risk a longer (and disqualifying) sentence, and accordingly may have developed reasonable reliance interests. Petitioner, by contrast, was convicted prior to the 1990 amendment. See Pet. App. 39a

In any event, the deviation in the circuits' analysis is narrow, because the Third Circuit nonetheless acknowledged that reliance is "but one consideration." *Atkinson*, 479 F.3d at 231. As a result, its split from the other circuits' analysis extends only to whether a determination of retroactive effect *must* turn on reliance. No circuit has denied that a determination of retroactive effect *may* be based on reliance. As the Seventh Circuit recently noted, "the distinction between [its] analysis" and "that of the Third, Eighth, and Tenth Circuits * * * is one of fine line drawing." *Canto* v. *Holder*, No. 08-4272, 2010 WL 308795, at *5 (Jan. 28, 2010).

3. Petitioner's alternative argument (Pet. 24-25)—that if reliance is a significant factor in evaluating retroactive effect, she could have reasonably relied on the

continued availability of Section 212(c) relief in marking her decision to go to trial rather than plead guilty—is unpersuasive. As the Seventh Circuit recently explained, even though *St. Cyr* recognized that "it is more than likely that those aliens faced with plea agreements contemplated their ability to seek [S]ection 212(c) relief, the same logic cannot necessarily be extended to those aliens convicted at trial" because they did not, as a categorical matter, "forgo any possible benefit in reliance on [S]ection 212(c)." *Canto*, 2010 WL 308785, at *6. And no court has interpreted this Court's retroactivity analysis to find a retroactive effect based on new consequences to *every* prior decision or action. To the contrary, several courts have specifically held that the prior decision to commit a crime is not protected against application of Section 212(c)'s repeal, whether the alien asserted possible reliance on not getting caught, or acquittal at trial, or a sentence that does not bar relief, or the continued availability of relief at all. See *Ponnapula*, 373 F.3d at 495-496 & n.14; *Rankine*, 319 F.3d at 101-102; *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003); *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1150-1151 (10th Cir. 1999), cert. denied, 529 U.S. 1041 (2000); *LaGuerre* v. *Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000). Indeed, in the decision that this Court affirmed in *St. Cyr*, the Second Circuit explained that "[i]t would border on the absurd to argue" that aliens "might have decided not to commit" crimes "or might have resisted conviction more vigorously, had then known that if they were not only imprisoned but also * * * ordered deported, they could not ask for a discretionary waiver of deportation." *St. Cyr* v. *INS*, 229 F.3d 406, 418 (2000) (quoting *Jurado-Gutierrez*, 190

F.3d at 1150; in turn quoting *LaGuerre*, 164 F.3d at 1041), aff'd, 533 U.S. 289 (2001). Yet, that is the sort of result to which petitioner's alternative interpretation of retroactive effect would lead.

Petitioner's circumstances in fact are quite distinct from those aliens on whom Section 212(c)'s repeal was held to have a retroactive effect by virtue of reliance that took some form other than a guilty plea. The alien in the Ninth Circuit's decision in *Hernandez de Anderson* took the affirmative step of bringing "herself—and her criminal convictions—to the INS's attention by applying for naturalization," and, in doing so, had relied upon the potential availability of suspension of deportation by waiting to apply for naturalization until she had accrued the ten years of continuous residence that made her eligible for such relief. 497 F.3d at 936-937, 941-943. The alien in the Tenth Circuit's decision in *Hem* made an objectively reasonable decision to forgo a right to an appeal that would have put him "at risk of being sentenced to a sentence longer than 5 years * * * making him ineligible for § 212(c) relief" after 1990. 458 F.3d at 1199.[3]

Petitioner, by contrast, has identified no affirmative act that she committed in possible reliance on the availability of Section 212(c) before its repeal. See Pet. App. 29a. Her suggestion (Pet. 25) that a decision to go to trial rather than plead guilty might, in certain circumstances, have been intended to reduce the risk of a sentence that would bar relief under Section 212(c) is irrelevant to her case, because the five-year-imprisonment

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[3] The aliens in *Atkinson* and *Lovan* were also both convicted after the 1990 narrowing of Section 212(c) relief on the basis of sentence length, on which this Court focused in *St. Cyr*. See p. 12, *supra*; *Atkinson*, 479 F.3d at 224; *Lovan*, 574 F.3d at 992.

ceiling was not added to Section 212(c) until 1990, four years after her conviction. See p. 2, *supra*. Petitioner thus can point to no act or transaction that raises even the prospect of reasonable reliance.

4. Finally, petitioner also cannot avoid the fact that the questions she presents involve the retroactive effect of a statutory repeal that occurred more than 13 years ago. She identifies 57 court of appeals decisions since *St. Cyr* in which she claims "[t]he issue has arisen." Pet. 14 n.6. That list, however, is largely a reflection of the fact that some immigration cases remain pending for a long time. Like this case, at least 40 of the cases petitioner cites involved deportation or removal proceedings that were initiated by the INS before *St. Cyr* was decided in 2001.[4] Among the remaining cases on peti-

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[4] See *Saravia-Paguada* v. *Gonzales*, 488 F.3d 1122, 1124 (9th Cir. 2007) (proceeding began in May 1990), cert. denied, 128 S. Ct. 2499 (2008); *Alvarez-Aceves* v. *Fasano*, 150 Fed. Appx. 596, 597 (9th Cir. 2005) (began in March 1996); *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1118 (9th Cir. 2002) (began in April 1996); *Crump* v. *Reno*, 130 Fed. Appx. 500 (2d Cir. 2005) (began in May 1996; based on Gov't C.A. Br., 2005 WL 2614749, at *4); *Walcott* v. *Chertoff*, 517 F.3d 149, 151 (2d Cir. 2008) (began in July 1996); *Matian* v. *Mukasey*, 262 Fed. Appx. 753 (9th Cir. 2007) (began in October 1996; based on Gov't C.A. Br., 2005 WL 5302167); *Restrepo* v. *McElroy*, 369 F.3d 627, 630 (2d Cir. 2004) (began in October 1996); *Raya-Baez* v. *INS*, 63 Fed. Appx. 381 (9th Cir. 2003) (began in November 1996; based on Gov't C.A. Br., 2003 WL 21471673, at *4); *Johnson* v. *Holder*, 564 F.3d 95, 97 (2d Cir. 2009) (began in December 1996), petition for cert. pending, No. 09-7909 (filed Oct. 8, 2009); *Montenegro* v. *Ashcroft*, 355 F.3d 1035 (7th Cir. 2004) (began in January 1997; based on Gov't C.A. Br., 2003 WL 23336264, at *5); *Chambers* v. *Reno*, 307 F.3d 284, 287 (4th Cir. 2002) (began in April 1997); *Serrano-Salcedo* v. *Ashcroft*, 56 Fed. Appx. 803 (9th Cir. 2003) (began in May 1997; based on Pet. C.A. Br., 2002 WL 32112814, at *3); *Lopez-Lopez* v. *Mukasey*, 285 Fed. Appx. 440 (9th Cir. 2008) (began in June 1997; based on Gov't C.A. Br., 2006 WL 2450818, at *4); *Atkinson*

v. *Attorney Gen.*, 479 F.3d 222, 224 (3d Cir. 2007) (began in June 1997); *Singh* v. *Keisler*, 255 Fed. Appx. 710, 712 (4th Cir. 2007) (began in June 1997); *Quinones-Saucedo* v. *Ashcroft*, 83 Fed. Appx. 865 (9th Cir. 2003) (began in August 1997; based on Pet. C.A. Br., 2003 WL 22717151, at *4); *Wilson* v. *Gonzales*, 471 F.3d 111, 113 (2d Cir. 2006) (began in November 1997); *Haque* v. *Holder*, 312 Fed. Appx. 946 (9th Cir. 2009) (began in 1997; based on Gov't C.A. Br., 2006 WL 5211835, at *7); *Morgorichev* v. *Mukasey*, 274 Fed. Appx. 98, 99-100 (2d Cir. 2008) (began in 1997), cert. denied, 129 S. Ct. 2424 (2009); *Carranza-De Salinas* v. *Gonzales*, 477 F.3d 200, 203 (5th Cir. 2007) (began in 1997); *Appel* v. *Gonzales*, 146 Fed. Appx. 175 (9th Cir. 2005) (began in 1997; based on Pet. C.A. Br., 2004 WL 5469141, at *5), cert. denied, 549 U.S. 1051 (2006); *Manea* v. *Mukasey*, 301 Fed. Appx. 589 (9th Cir. 2008) (began before February 1998; based on Pet. C.A. Br., 2008 WL 2647725, at *4); *Pugliese* v. *Gonzales*, 174 Fed. Appx. 601 (2d Cir. 2006) (began in March 1998; based on Gov't C.A. Br., 2005 WL 5166523); *Evangelista* v. *Ashcroft*, 359 F.3d 145, 148 (2d Cir. 2004) (began in April 1998), cert. denied, 543 U.S. 1145 (2005); *Rankine* v. *Reno*, 319 F.3d 93, 96 (2d Cir. 2003) (began in May 1998), cert. denied, 540 U.S. 910 (2003); *Thom* v. *Ashcroft*, 369 F.3d 158, 160 (2d Cir. 2004) (began in June 1998), cert. denied, 546 U.S. 828 (2005); *Garcia* v. *Fasano*, 62 Fed. Appx. 816 (9th Cir. 2003) (began in August 1998; based on Pet. C.A. Br., 2002 WL 32118430, at *3); *Singh* v. *Mukasey*, 520 F.3d 119, 121 (2d Cir. 2008) (began in January 1999); *Tecat* v. *Gonzales*, 188 Fed. Appx. 308 (5th Cir. 2006) (began in March 1999; based on Gov't C.A. Br. at 5 (No. 05-60480)); *Evangelista* v. *Attorney Gen.*, 176 Fed. Appx. 306, 308 (3d Cir. 2006) (began in April 1999); *Kelava* v. *Gonzales*, 434 F.3d 1120 (9th Cir.) (began in June 1999; based on Gov't C.A. Br., 2004 WL 3202731, at *3), cert. denied, 549 U.S. 810 (2006); *Trevor* v. *Reno*, 88 Fed. Appx. 445, 445 (2d Cir. 2004) (necessarily began before order of removal issued in July 1999); *Swaby* v. *Ashcroft*, 357 F.3d 156, 158 (2d Cir. 2004) (began in August 1999); *Theodoropoulos* v. *INS*, 358 F.3d 162, 165 (2d Cir.) (began in September 1999), cert. denied, 543 U.S. 823 (2004); *Berishaj* v. *Gonzales*, 238 Fed. Appx. 275 (9th Cir. 2007) (began in October 1999; based on Pet. C.A. Br., 2006 WL 2983803); *Hem* v. *Maurer*, 458 F.3d 1185, 1187 (10th Cir. 2006) (began in November 1999); *Sidhu* v. *Gonzales*, 179 Fed. Appx. 221, 223 (5th Cir.) (began in 1999), cert. denied, 549 U.S. 993 (2006); *United States* v. *Munoz-Recillas*, 224 Fed. Appx. 621, 623 (9th Cir.) (began in 2000), cert. denied, 128 S. Ct. 189 (2007); *Ponnapula* v.

tioner's list, one involved a post-AEDPA conviction,[5] and only eight involved immigration proceedings that were initiated after 2002.[6]

To be sure, there are other cases already in the pipeline, but the numbers are diminishing. Petitioner's amici cite (at 15) statistics about the frequency with which Section 212(c) relief has been granted in the last several years. That number declined from 1905 grants in FY 2004 to 1049 grants in FY 2008. See Exec. Office for Immigration Review, U.S. Dep't of Justice, *FY 2008 Statistical Year Book* Table 15, at R3 (2009) <http://www.justice.gov/eoir/statspub/fy08syb.pdf>. Although the *Statistical Year Book* for FY 2009 has not yet been published, the corresponding number for FY 2009 is expected to be 858 grants—reflecting a 55% decline since

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Ashcroft, 373 F.3d 480, 485 (3d Cir. 2004) (began in October 2000); *Jaw-Shi Wang* v. *Ashcroft*, 71 Fed. Appx. 624 (9th Cir. 2003) (necessarily began before charge of removability was sustained in October 2000; based on Gov't C.A. Br., 2003 WL 21956383, at *3).

[5] *United States* v. *De Horta Garcia*, 519 F.3d 658 (7th Cir.), cert. denied, 129 S. Ct. 489 (2008).

[6] *Cerbacio-Diaz* v. *Gonzales*, 234 Fed. Appx. 583 (9th Cir. 2007) (proceeding began in June 2003; based on Gov't C.A. Br., 2006 WL 4032551, at *7); *Gallardo* v. *Mukasey*, 279 Fed. Appx. 484 (9th Cir. 2008) (began in October 2003; based on Gov't C.A. Br., 2006 WL 2628033, at *4); *Esquivel* v. *Mukasey*, 543 F.3d 919, 920 (7th Cir. 2008) (began in September 2004); *Cruz-Garcia* v. *Mukasey*, 285 Fed. Appx. 446 (9th Cir. 2008) (began in November 2004; based on Gov't C.A. Br., 2007 WL 1225610, at *3), cert. denied, 129 S. Ct. 2424 (2009); *Nadal-Ginard* v. *Holder*, 558 F.3d 61, 64 (1st Cir. 2009) (began in 2004); *Martinez-Murillo* v. *Mukasey*, 267 Fed. Appx. 519 (9th Cir. 2008) (began in January 2005; based on Pet. C.A. Br., 2006 WL 4044532, at *6); *Garcia-Ortiz* v. *Gonzales*, 194 Fed. Appx. 513 (10th Cir. 2006) (began in January 2005; based on Gov't C.A. Br., 2006 WL 6086256, at *4); *Prieto-Romero* v. *Mukasey*, 304 Fed. Appx. 512 (9th Cir. 2008) (began in February 2005; based on Gov't C.A. Br., 2008 WL 486772, at *5).

FY 2004. Similarly, according to other unpublished statistics compiled by the Executive Office of Immigration Review, the number of applications for Section 212(c) relief has fallen dramatically. In FY 2004, there were 2617 applications; in FY 2008, there were 1281; and in FY 2009, there were 576. That reflects a 78% decline since FY 2004—and a 55% decline since FY 2008. Moreover, because most criminal defendants plead guilty, the number of aliens affected by the general rule in the circuits that Section 212(c) does not apply to an alien who was convicted after a trial would be only a small fraction of those numbers.[7]

Thus, there is still every reason to believe that this is an issue of diminishing prospective importance—and one that is already of considerably less current importance than it was when the government sought this Court's review in *St. Cyr* nearly ten years ago. See Pet. 13.

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[7] Petitioner's amici also describe (at 6-11) scenarios in which aliens with pre-1996 convictions may find themselves placed in removal proceedings, including instances when they return from travel abroad, apply for citizenship, or renew their permanent residency or "green" cards. Because green cards issued after 1989 expire after ten years, see 54 Fed. Reg 47,586 (1989), nearly all lawful permanent residents who are removable on the basis of pre-IIRIRA convictions have already been exposed to immigration authorities at some point since 2000—which further shrinks the pool of those who might still have new proceedings initiated against them on the basis of pre-1996 convictions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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